(4)

No. 97-759

Supreme Court, U.S.
FILED
DEC 4 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

JAMES W. CILECEK, M.D.,

Petitioner,

vs.

INOVA HEALTH SYSTEMS SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL C. SKELLY
JONATHAN T. REES
HOGAN & HARTSON, LLP
Attorneys for Respondents Emergency Physicians of Northern Virginia, Ltd. and Thom A. Mayer, M.D.
555 13th Street, N.W.
Columbia Square
Washington, D.C. 20004-1109
(202) 637-5600

ANTHONY J. TRENGA
Counsel of Record
MICHAEL L. ZUPAN
HAZEL & THOMAS, P.C.
Attorneys for Respondents Inova Health System Services and Joan Miles, R.N.
510 King Street
Suite 200
Alexandria, Virginia 22314
(703) 836-8400

72584 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

2 4 88

QUESTION PRESENTED

Whether the Fourth Circuit, based on the particular facts presented herein, properly affirmed the summary judgment of the District Court finding Dr. Cilecek to be an independent contractor and dismissing his claims under Title VII, 42 U.S.C. § 2000(e)?

STATEMENT REQUIRED BY RULE 29.6

The parent company for Respondent Inova Health System Services is Inova Health System Foundation. Inova Health System Services has one nonwholly owned subsidiary, Home Health Clinical Services, L.L.C.

Respondent Emergency Physicians of Northern Virginia, Ltd. has no parent corporation, nor does it have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Required By Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Counter Statement of the Case	1
Reasons for Denying the Writ	6
I. The Fourth Circuit Properly Applied The Law To The Undisputed Facts.	6
A. The Fourth Circuit Applied The Law The Petition Cites As Controlling.	6
B. The Fourth Circuit Properly Considered The Factors Relating To Employee Or Independent Contractor Status In The Context Of Dr. Cilecek's Profession.	7
C. Dr. Cilecek Has Failed To Preserve Any Claim That He Was Denied Discovery.	12
II. The Fourth Circuit's Opinion Does Not Contradict Either *Garcia v. Copenhaver, Bell & Assoc., M.D.'s* Or *Vizcaino v. Microsoft Corp.*	13
III. The Decision Of The Fourth Circuit Does Not Affect Workers Protected Under Title VII.	15
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Alexander v. Rush North Shore Medical Ctr.,101 F.3d 487 (7th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997) 11, 12

Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982) 12

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 7, 8

Dutch Square Medical Ctr. Ltd. Ptnrship v. United States, 1994-2 Tax Cas. (CCH) ¶ 50,490 (D.S.C. Sep. 6, 1994) 15, 16

EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983) .. 12

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996) 12

Garcia v. Copenhaver, Bell & Assoc., M.D.'s, 104 F.3d 1256 (11th Cir. 1997) 13, 14

Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983) 7, 11

Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 211 (4th Cir. 1993) 7

Contents

	Page
Idaho Ambucare Ctr., Inc. v. United States, 57 F.3d 752 (9th Cir. 1995)	15, 16
Lambertsen v. Utah Dep't of Corrections, 79 F.3d 1024 (10th Cir. 1996)	12
MacMullen v. South Carolina Elec. & Gas Co., 312 F.2d 662 (4th Cir.), *cert. denied*, 373 U.S. 912 (1963)	11
Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992)	7, 8
Nguyen v. CNA Corp., 44 F.3d 234 (4th Cir. 1995)	12
Oestman v. National Farmers Union Ins. Co., 958 F.2d 303 (10th Cir. 1992)	7
Paddington Partners v. Bouchard, 34 F.3d 1132 (2d Cir. 1994)	12
Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997)	13, 14
Wilde v. County of Kandiyohi, 15 F.3d 103 (8th Cir. 1994)	7
Wood v. Standard Products Co., Inc., 671 F.2d 825 (4th Cir. 1982)	10

Contents

Page

Statutes Cited:

29 U.S.C. §§ 621-634 (1994) 13

42 U.S.C. § 2000(e) i

Rules Cited:

Fed. R. Civ. P. 12(b)(1) 13

Fed. R. Civ. P. 12(b)(6) 2

Fed. R. Civ. P. 56 2

Fed. R. Civ. P. 56(f) 12

United States Supreme Court Rule 10 6

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Inova Health System Services ("Inova"), Joan Miles, R.N., Emergency Physicians of Northern Virginia, Ltd. ("EPNV") and Thom A. Mayer, M.D. request that this Court deny the Petition for a Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Fourth Circuit in this matter. This case involves nothing more than the application of this Court's settled test for determining whether a worker is an independent contractor or an employee to a unique set of facts. The Court of Appeals and the District Court both reached the determination, based on undisputed facts, that the Petitioner was an independent contractor for the purposes of his Title VII claim. The case has been reviewed exhaustively by the lower courts, Petitioner having sought reconsideration from the District Court and reconsideration and in banc review from the Court of Appeals. This case does not break any new ground; nor does the decision of the Fourth Circuit conflict with decisions of the Ninth and Eleventh Circuits, as Petitioner contends. Rather, the differences in these decisions merely reflect the different factual records on which they are based. The Fourth Circuit's decision is clearly correct; and the issues raised by the Petition are not worthy of this Court's plenary consideration. This Petition should be denied.

COUNTER STATEMENT OF THE CASE

1. This case was initiated by Dr. Cilecek against Inova, Joan Miles, R.N. (an Inova employee), EPNV, and EPNV's President Thom A. Mayer, M.D. In his lawsuit, Dr. Cilecek contends that he was wrongfully discharged in violation of Title VII of the Civil Rights Act of 1964, in retaliation for testimony rendered in an employment discrimination action against Inova brought by one of its nurses. In addition, Dr. Cilecek asserted several state law claims.

2. Inova and Nurse Miles responded to the Complaint with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and EPNV and Dr. Mayer filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Upon consideration of the undisputed facts presented in support of these motions, including the sworn deposition testimony of Dr. Cilecek in which he admitted that he operated as an independent contractor, the District Court granted summary judgment in favor of all defendants on the Title VII claim and dismissed the state law claims without prejudice. (*See* Order of Dismissal, attached to the Petition at A27-28).

3. Dr. Cilecek moved the District Court to reconsider and vacate the dismissal. Upon review of the motion, and the defendants' oppositions thereto, the District Court denied the motion. (*See* Order attached to the Petition at A26).

4. Dr. Cilecek appealed the dismissal to the United States Court of Appeals for the Fourth Circuit. The matter was fully briefed and argued. The Fourth Circuit, agreeing with the District Court, found that the undisputed facts established, as a matter of law, that Dr. Cilecek was an independent contractor and not an employee of either EPNV or Inova.[1]

5. Dr. Cilecek then moved for reconsideration or rehearing in banc by the Fourth Circuit. The Department of Justice filed an *Amicus Curiae* brief in support of Dr. Cilecek's motion. Upon consideration of the arguments presented, which are largely the arguments presented here, the Fourth Circuit denied the motion for reconsideration or rehearing in banc by a 12-1 vote.

6. This Petition is based primarily on the alleged

1. Two of the named defendants, Dr. Mayer and Nurse Miles, were not alleged to be Dr. Cilecek's employer and there is no claim that the dismissal of the Title VII claim should be reversed as to them.

misapplication of the law to Dr. Cilecek's version of the facts, which either ignores or mischaracterizes the factual record in significant respect. When all of the undisputed factual evidence is considered, as it was by both courts below, it becomes apparent that this case has been correctly decided and does not raise significant issues deserving of review by this Court.

7. Inova is a Virginia corporation that owns and operates several health care facilities in northern Virginia, including Fairfax Hospital and ACCESS of Reston. (Petition at A2).

8. In March, 1989, Inova contracted with EPNV to provide physicians to staff the emergency medicine facilities at Fairfax Hospital and ACCESS of Reston. (Petition at A2).

9. Dr. Cilecek, who had been working as an independent contractor for another entity at Fairfax Hospital, wrote a letter to EPNV offering to work for EPNV "as an independent contractor." (Petition at A2, J.A. at 176).[2] There was no evidence presented that Dr. Cilecek was ever employed by, or had a direct contractual relationship with, Inova.

10. In August, 1991, Dr. Cilecek unilaterally reduced his hours with EPNV to work for Mary Washington Hospital in Stafford, Virginia. Mary Washington Hospital has no relationship to Inova or EPNV. Dr. Cilecek returned to EPNV in December 1992, again requesting independent contractor status. (Petition at A3). There is no mention of any employment status with Inova.

11. In July 1994, Dr. Cilecek again unilaterally reduced the number of shifts he was willing to work for EPNV, to allow time for a large personal project and to work at another emergency medical facility. (Petition at A3).

---

2. References to J.A. are references to the Joint Appendix in the Fourth Circuit.

12. In the deposition he gave in an employment discrimination suit involving an Inova nurse, Dr. Cilecek, while represented by counsel, testified several times that he was an independent contractor engaged by EPNV. Nowhere did he claim an employment relationship with EPNV or any contractual relationship whatsoever directly with Inova. (J.A. at 174, 175-76, 197).

13. While the facts establishing Dr. Cilecek's intention to be an independent contractor are compelling, these were not, as Dr. Cilecek argues, the only facts considered. In addition to the above, and following a *de novo* review of the entire record, the Fourth Circuit made the following factual findings:

> When we consider the factors most relevant to the relationship established between Cilecek and Emergency Physicians in this case, we conclude that the district court was correct in determining that Cilecek was an independent contractor. Most significantly: (1) The parties expressly set out from the beginning to create an independent contractor relationship, in distinction from the employment relationship that Emergency Physicians had with other doctors; (2) Cilecek proposed the number of hours he would work during any given month and the allocation of those hours to various shifts, and the hours that he worked were not uniform; (3) Cilecek had freedom to do other work, not only for himself but also for other health care facilities unrelated to Inova or Emergency Physicians; (4) Cilecek was paid only for work actually performed and not a uniform salary; (5) Except for professional liability insurance, Cilecek funded his own pension and other "employee benefits"; and (6) Both Cilecek and Emergency Physicians treated his taxes as if Cilecek were an independent contractor, in

> that Emergency Physicians did not withhold any taxes that were incident to an employment relationship. In summary, Cilecek exercised an independence from Emergency Physicians that enabled him to determine his hours, his income, and who he worked for. These are core incidents to a work relationship that are inconsistent with employee status.

(Petition at A11).

14. The trial court likewise considered more than just the "label" in reaching its determination that Dr. Cilecek was an independent contractor.

> There is more in this case than how the taxes are treated. This plaintiff asked to be an independent contractor, he contracted with his employer to be an independent contractor. He has testified under oath in another hearing that he was an independent contractor. He worked for others at times and had the opportunity and the latitude to work for others. He was not bound by any noncompetition agreement as other similarly situated employees at the Emergency Physicians. He didn't receive the same benefits. He didn't receive the same tax treatment. His duties and his scheduling were different than regular employees. He wasn't required to be on call. He designated his own shifts. And he was not supervised basically in the providing of care even though he did use their equipment.
>
> I believe simply with these differences in a regular employee, that simply the fact that he was paid by them and used the equipment that they provide in their facility does not make him an employee. And when you add all these up, I find that it is clear that he was

> an independent contractor and not covered by the federal Act.

(Petition at A5-A6, the Fourth Circuit quoting the District Court's statements from the bench).

15. As evidenced by these holdings, both courts gave full consideration to the relevant factors regarding Dr. Cilecek's status as an independent contractor and the unique facts of this case.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT PROPERLY APPLIED THE LAW TO THE UNDISPUTED FACTS.

A. The Fourth Circuit Applied The Law The Petition Cites As Controlling.

The Rules of this Court state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the United States Supreme Court. Nonetheless, the primary complaint advanced in this Petition is that the Fourth Circuit did not properly consider the facts which Cilecek believes demonstrate his "employee" status, and that the rule of law applied to those facts, while the correct law, was misapplied. (Petition at 11). This same argument was rejected by both the District Court and the Fourth Circuit. In fact, it was the main focus of Petitioner's unsuccessful request to the Fourth Circuit for reconsideration or in banc review. This Petition adds nothing new.

Not only is the argument advanced by Dr. Cilecek insufficient to merit granting this Petition under the Rules of the United States Supreme Court, it is plainly wrong. The Fourth Circuit did not misapply the law. In reaching its conclusion that Dr. Cilecek was an independent contractor, the Fourth Circuit applied the common law agency considerations set out by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). (Petition at A6-A10).[3] In his Petition, Dr. Cilecek cites both of these cases for the controlling rule of law. (Petition at pp. 9-10). *Reid* and *Darden* do not require that *every* factor point toward either an "independent contractor" or "employee" relationship. Rather, the court must consider the "working relationship as a whole." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994). *See also Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303, 305-306 (10th Cir. 1992) (the relationship should be characterized only after considering all of the facts). This is precisely the analysis undertaken by the Fourth Circuit and the District Court.

B. The Fourth Circuit Properly Considered The Factors Relating To Employee Or Independent Contractor Status In The Context Of Dr. Cilecek's Profession.

The Fourth Circuit recognized that "no one factor is determinative and the consideration of factors must relate to the particular relationship under consideration." (Petition at A8, citing *Reid*, 490 U.S. at 752). In reaching its decision, the Fourth Circuit did no more than conclude — and properly so — that the traditional factors pertinent to Dr. Cilecek's status as an

---

3. These cases set forth substantially the same test as adopted by the Fourth Circuit in *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983) and *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211 (4th Cir. 1993), which are also cited in the Fourth Circuit opinion. (Petition at A8-9).

employee or an independent contractor must be considered within the context of hospital-based, emergency room medical care. (Petition at A9). In so doing, the Fourth Circuit acted in accordance with this Court's precedent in *Darden* and *Reid*.

Here, the record is replete with the Fourth Circuit's references to and consideration of all of the factors applicable to Dr. Cilecek's independent contractor status. In reaching its decision, the Fourth Circuit did not give a "shorthand" approach to Dr. Cilecek's claim. (Petition at 25). Nor did it rely solely upon Dr. Cilecek's admissions under oath that his status was that of an independent contractor. Rather, the Fourth Circuit gave full consideration to all of the circumstances surrounding the work Dr. Cilecek performed, including the following:

- Dr. Cilecek was free to do — and did do — other work, not only for himself but also for other health care facilities unrelated to Inova or EPNV;

- Dr. Cilecek proposed the number of hours he would work during any given month and the allocation of those hours to various shifts;

- Dr. Cilecek was paid only for work actually performed and not a uniform salary as was the practice with EPNV employees;

- Except for professional liability insurance Dr. Cilecek received no benefits. He funded his own pension and all other "employee benefits";

- Both Dr. Cilecek and EPNV treated his

taxes as if Dr. Cilecek were an independent contractor, in that EPNV did not withhold any taxes that were incident to an employment relationship; and

- Dr. Cilecek worked primarily alone at night without supervision.

(Petition at A11 and J.A. at 346). Dr. Cilecek fails to address these facts in his Petition.

With respect to the parties' intent, the undisputed facts establish that Dr. Cilecek aggressively sought independent contractor status, and that the parties intended for Dr. Cilecek to function as an independent contractor:

- In May of 1990, Dr. Cilecek sent a letter to EPNV requesting independent contractor status (J.A. at 118);

- In October of 1992, after Dr. Cilecek had reduced his hours to work at another facility, he sent another letter to EPNV, confirming that he wished to resume his relationship with EPNV as an independent contractor (J.A. at 148);

- Dr. Cilecek testified repeatedly under oath, in the presence of his counsel, that he was an independent contractor (J.A. at 174-75, Dep. at 7-8, 10-11);

- Dr. Cilecek testified that he was engaged as an independent contractor working at Fairfax Hospital by another physician

group prior to his engagement with EPNV (J.A. at 176, Dep. p. 15);

- Dr. Cilecek testified that some physicians with EPNV were employees while others, such as himself, were independent contractors. (J.A. at 177, Dep. p. 18).

Dr. Cilecek's numerous admissions plainly reflect the parties' desire to create a relationship that subjected Dr. Cilecek to a lessor degree of control than EPNV's employees. None of these facts is disputed, nor could they be; and Dr. Cilecek's assertion that the Fourth Circuit rested its decision exclusively on the "label" that the parties used to describe their relationship is baseless.

In addition to overlooking these undisputed facts, Dr. Cilecek substantially overstates the importance of the rules and regulations with which he had to comply. These requirements, which he claims subjected him to hospital control, were administrative details necessary for uniform hospital administration, pertaining to such matters as to how to fill out patient histories and progress reports, how to order medications, order consultations, or handle prescription pads. This is not the type of control that connotes employee status.

> [T]he real test [concerning whether one is an employee or independent contractor] is control over the primary activity contracted for and not the peripheral, administrative acts relating to such activity.

Wood v. Standard Products Co., Inc., 671 F.2d 825, 832 (4th Cir. 1982). In the context of physicians, the "primary activity contracted for" is the medical care to be provided. Neither Inova nor EPNV exercised any significant control over Dr. Cilecek's

decisions regarding the medical care to be provided. Dr. Cilecek presented no evidence that anyone other than he made medical decisions for the patients that he was examining. Rather, the undisputed evidence is that Dr. Cilecek worked primarily at night, without any supervision regarding the medical care administered. (J.A. at 346). *See Garrett*, 721 F.2d at 982 (whether the individual is a specialist who works without supervision is a factor to be considered in determining employer/independent contractor status).

Moreover, the rules and regulations to which Dr. Cilecek refers apply to any physician who has privileges at the Hospital. If these administrative rules and regulations established an employer/employee relationship, then all physicians who treat patients at the hospital would be hospital employees. This is clearly not the case. Hospital privileges do not make a physician an employee of a hospital. *See Alexander v. Rush North Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997). Dr. Cilecek's compliance with these administrative rules and regulations is therefore not probative of "employee" status and the courts below properly so found. (Petition at A9-A11). In this connection, the Fourth Circuit did not "introduce a new rule for medical workers," as the Petition asserts. (Petition at 19). Rather, the Fourth Circuit gave full consideration to all of the circumstances surrounding Dr. Cilecek's work status. Upon such consideration, the Fourth Circuit properly determined, as a matter of law, based on the undisputed facts, that Dr. Cilecek was an independent contractor. (Petition at A11). *See MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 670 (4th Cir.), *cert. denied*, 373 U.S. 912 (1963) ("whether the District Court applied the proper standards to essentially undisputed facts" was a question of law).[4]

4. Summary judgment is properly affirmed where, as here, the material (Cont'd)

C. Dr. Cilecek Has Failed To Preserve Any Claim That He Was Denied Discovery.

Dr. Cilecek's argument that summary judgment should not have been granted pending discovery also is without merit. (Petition at 16). The record before the Court contains abundant undisputed evidence directly pertinent to the independent contractor/employee analysis. Dr. Cilecek himself was in a position to dispute most of the evidence presented were it incorrect, but he did not present any conflicting evidence. Furthermore, Dr. Cilecek failed to file an affidavit pursuant to Fed. R. Civ. P. 56(f), stating with specificity the need for additional discovery, as he was required to do under well-established precedent. "[T]he failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) *quoting Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994).

> [A] party may not simply assert in its brief that discovery was necessary . . . when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit.

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996) *quoting Nguyen*, 44 F.3d at 242. Dr. Cilecek never sought leave of Court to seek additional discovery.[5] At

---

(Cont'd)

facts establish that an independent contractor relationship existed as a matter of law. *Alexander v. Rush North Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997); *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024 (10th Cir. 1996); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3d Cir. 1983); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).

5. Dr. Cilecek had ample opportunity to seek leave to take discovery, since the Defendants' reply briefs were served approximately thirteen days before oral argument on the summary judgment motion.

the hearing, he did not argue that he somehow was prejudiced by going forward. Instead, Cilecek's counsel — accompanied by Dr. Cilecek himself — chose to proceed with the summary judgment hearing without complaint. (J.A. at 354-361).

II.

THE FOURTH CIRCUIT'S OPINION DOES NOT CONTRADICT EITHER *GARCIA v. COPENHAVER, BELL & ASSOC., M.D.'S* OR *VIZCAINO v. MICROSOFT CORP.*

The Petition contends that the Fourth Circuit's decision conflicts with the decisions of the Eleventh Circuit in *Garcia v. Copenhaver, Bell & Assoc., M.D.'s*, 104 F.3d 1256 (11th Cir. 1997), and the Ninth Circuit in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997). In fact, there is no conflict, much less one that would justify granting a writ. It is commonplace for different facts and circumstances to produce different results under the same legal standard; there is nothing more in these cases than one appellate court finding dismissal appropriate on one set of facts and other appellate courts finding summary disposition inappropriate on different facts in different procedural postures.

Garcia involved a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In *Garcia*, the defendant contended that it was not an employer under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994). The trial court agreed and dismissed the claim. The Eleventh Circuit reversed. In so doing, the court engaged in a detailed analysis of Rule 12(b)(1) motions practice clearly not pertinent to this case. Moreover, the court in *Garcia* did not find that the emergency doctor was an employee. Rather, it held that the evidence presented to the trial court was insufficient to establish, as a matter law, that Dr. Garcia was an

independent contractor. *Garcia*, 104 F.3d at 1266-67. In this regard, unlike Dr. Cilecek, Dr. Garcia did not specifically bargain for independent contractor status, did not admit under oath that he intended to be and was an independent contractor and did not work for other emergency medical facilities while working for the alleged "employer." Likewise, there is no evidence mentioned in *Garcia* as to the payment of taxes or the provision of benefits, issues which clearly support independent contractor status. In addition, the Eleventh Circuit also specifically found that there were "disputed facts concerning the amount of control Copenhaver, Bell exerted over Garcia." *Garcia*, 104 F.3d at 1266-67. The facts relating to the control exercised over Dr. Cilecek, as identified in his Petition, were presented and considered by the courts below. Both the District Court and the Fourth Circuit found that those facts, to which there was no material dispute, were insufficient to constitute an employee relationship.

Nor is the Ninth Circuit's decision in *Vizcaino* inconsistent with the decision of the Fourth Circuit in this case. In *Vizcaino*, the Internal Revenue Service determined that numerous individuals who worked at Microsoft were employees for taxation purposes, even though their contracts identified them as independent contractors. Microsoft agreed with the IRS and converted some of these individuals to full time Microsoft employees. Several workers who were not retained as full time employees sought inclusion in Microsoft's employee benefit plans for their prior work. The plans challenged the employee status of these workers. In finding that the workers could be included in the benefit plans, the Ninth Circuit relied heavily on Microsoft's admission as to their employee status. These facts are not analogous to Dr. Cilecek's claims. There is nothing in the *Vizcaino* decision that conflicts with this case.

III.

THE DECISION OF THE FOURTH CIRCUIT DOES NOT AFFECT WORKERS PROTECTED UNDER TITLE VII.

Contrary to Dr. Cilecek's argument, the decision in this case does not eliminate the protections of Title VII or any other statute for any individual who is presently covered under Title VII. From its inception, Title VII has excluded independent contractors from its coverage and the decision in this case does not alter their status. Here, the Fourth Circuit made a determination that a single emergency room physician was an independent contractor, based on the law previously established by this Court and the peculiar facts of this case — including Dr. Cilecek's sworn admission that he was an independent contractor. The decision does not deprive any employees of their rights.

Dr. Cilecek's policy arguments, such as whether the exclusion of independent contractors facilitates the purposes of Title VII or whether changing conditions in the workplace have somehow altered the efficacy of Title VII, are for the Congress to decide. This Court should not accept Dr. Cilecek's invitation to contort the definition of an independent contractor to satisfy Dr. Cilecek's assessment of the proper reach of Title VII.

Finally, the argument that this decision has a negative impact on the Internal Revenue Service is without merit. (Petition at 22-24). The tax cases cited by Dr. Cilecek, relating to the employee/independent contractor distinction are based on precisely the fact-specific inquiry that the Fourth Circuit adopted in this case. For example, in both *Idaho Ambucare Ctr., Inc. v. United States*, 57 F.3d 752 (9th Cir. 1995) and *Dutch Square Medical Ctr. Ltd. Ptnrship v. United States*, 1994-2 Tax Cas.

(CCH) ¶ 50,490 (D.S.C. Sep. 6, 1994), a physician practicing through his own personal professional association served as the administrator of an urgent care facility. In both cases, the owner of the facility treated the administrator as an independent contractor. In *Idaho Ambucare*, the Ninth Circuit held that the physician-administrator had an arms-length contract with the urgent care group, under which control over the physician was reserved to the physician's professional association and that he was therefore an independent contractor to the urgent care facility, even though he had significant administrative responsibilities. Conversely, in *Dutch Square*, the court found that the physician-administrator of an urgent care group was an employee of the urgent care group because there was no arms-length contract reserving such control to the physician's professional association. These decisions simply illustrate that different factual circumstances, in seemingly similar situations, can produce opposite results. Here, the agreement between EPNV and Dr. Cilecek was clearly arms-length. Moreover, Dr. Cilecek retained full control over his medical decisions, as well as other important aspects of his practice; and the decision of the Fourth Circuit below is consistent with these tax decisions.

It is obvious that Dr. Cilecek is dissatisfied with the decision of his case. However, the Fourth Circuit applied the appropriate law, which Dr. Cilecek embraces, to facts that he does not dispute. Dr. Cilecek's dissatisfaction with this case's outcome does not merit further consideration by the Supreme Court of the United States.

CONCLUSION

Wherefore, Respondents Inova Health System Services, Joan Miles, R.N., Emergency Physicians of Northern Virginia, Ltd., and Thom A. Mayer, M.D., respectfully request that the Petition for a Writ of Certiorari filed by Dr. James Cilecek be denied.

Respectfully submitted,

ANTHONY J. TRENGA
Counsel of Record
MICHAEL L. ZUPAN
HAZEL & THOMAS, P.C.
Attorneys for Respondents
Inova Health System Services
and Joan Miles, R.N.
510 King Street
Suite 200
Alexandria, Virginia 22314
(703) 836-8400

PAUL C. SKELLY
JONATHAN T. REES
HOGAN & HARTSON, LLP
Attorneys for Respondents
Emergency Physicians of
Northern Virginia, Ltd. and
Thom A. Mayer, M.D.
555 13th Street, N.W.
Columbia Square
Washington, D.C. 20004-1109
(202) 637-5600